

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

ARCHIE MD, INC.,

Plaintiff,

v.

ELSEVIER, INC.,

Defendant.

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**Case No. 16-CV-6614**

**COMPLAINT**

**JURY TRIAL DEMANDED**

## **COMPLAINT**

Plaintiff, Archie MD, Inc. (“Archie MD”), as and for its Complaint against Defendant Elsevier, Inc. (“Elsevier”), hereby alleges as follows:

### **NATURE OF THE CASE**

1. Archie MD entrusted Elsevier for nearly a decade to honor the agreements between the parties governing the use and protection of Archie MD’s copyrights and trade secrets relating to its original 3-D medical animations. Motivated purely by greed, Elsevier has destroyed the long-standing relationship between the parties by first purporting to terminate the parties’ agreement in 2015, and then betraying Archie MD by stealing its unique animations for its own enrichment. To this day, Elsevier (i) continues to exploit over 355 of Archie MD’s animations long after Elsevier terminated the parties’ licensing agreement to use those animations; and (ii) has used Archie MD’s animations as the basis for creating at least 100 infringing, derivative works. Archie MD brings this action seeking redress against Elsevier for its unauthorized use and misappropriation of Archie MD’s original 3-D medical animations, which Archie MD created through years of investment, research, and dedication. Elsevier’s knowing misconduct caused and continues to cause Archie MD substantial and irreparable harm, and constitutes copyright infringement, breach of contract, and violates federal trade secrets law.

### **PARTIES**

2. Archie MD is a Florida corporation with its principal place of business located at 6420 Congress Avenue, Boca Raton, Florida 33487. Archie MD is a physician-led company that produces innovative educational products for a wide range of audiences within the health sciences industry. Archie MD’s business is centered around the catalog it has created of unique

3-D animations that simplify medical concepts with visual explanations. Archie MD has licensed these to various third parties, including previously to Elsevier.

3. Upon information and belief, Elsevier is a Delaware corporation with its principal place of business located at 360 Park Avenue South, New York, New York 10010. Elsevier is an international publishing company for medical, health, and other scientific publications, including books, journals, and other written products. Elsevier's parent company has reported Elsevier's 2015 annual revenues to be over two billion pounds.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action alleges violations of federal statutes, including the Copyright Act (17 U.S.C. § 101 *et seq.*) and Defend Trade Secrets Act of 2016 (18 U.S.C. § 1831 *et seq.*) ("DTSA").

5. This Court has supplemental jurisdiction over any related state law claims pursuant to 28 U.S.C. § 1367 because the claims are related to Archie MD's federal copyright and trade secret claims.

6. Jurisdiction is also proper pursuant to 28 U.S.C. § 1332 because Archie MD and Elsevier are citizens of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

7. This Court has personal jurisdiction over Elsevier pursuant to N.Y.C.P.L.R. §§ 301 and 302, because upon information and belief, Elsevier is registered to do business in the State of New York and/or conducts business within the State of New York, including in this District.

8. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) because Elsevier is a resident of this District.

## **FACTS RELEVANT TO ALL CLAIMS**

### **Archie MD's Medical Animations**

9. Starting in 2000, Archie MD began creating a comprehensive library of medical animations for use by both students and teachers for healthcare education, as well as for other commercial uses. At that time, there was very little medical animation available, and there is still nothing like Archie MD's expansive medical animation library today.

10. Archie MD started making 3-D animations based on the unique medical knowledge of the company's founder, Dr. Robert Levine, a board-certified physician who is in active practice at Jackson Memorial Hospital, a major teaching hospital of the University of Miami School of Medicine. Dr. Levine drafted each design by hand using his specialized knowledge of the human body as well as how diseases occur and are treated. He then worked closely with animators to transform the original hand-drawn sketches into Archie MD's extensive library of distinct 3-D animations.

11. Dr. Levine carefully constructed each design to create a visual that would simplify complex medical concepts. To do so, he made specific choices on how to best convey a concept to the viewer, including choosing when and how to show a particular part of the body, emphasize it, make it transparent, and use the three-dimensional features of the animation to rotate the view, in addition to making other artistic selections. It took significant time and effort to create each and every animation.

12. Archie MD has ensured that the specialized knowledge used to create the animations is safeguarded from competitors, as all individuals involved in the creation of the animations are closely supervised and bound by confidentiality obligations. The information used to create the animations is not generally known and would be extremely difficult to

duplicate, given the need for specialized medical knowledge combined with the original, artistic display of it through animation. Archie MD has not made its animations available to the general public and any licensee who has permission to view the animations online can only do so through a web portal that is protected by a passcode.

13. Through this significant effort, Archie MD has created one of the largest bodies of high-quality 3-D animations used in the health science education industry. The catalog now includes more than 1,500 animations of various medical concepts, including:

- The effects of commonly prescribed medications for high blood pressure, cardiac disease, asthma, diabetes, and high cholesterol;
- Medical procedures like endotracheal intubation, needle chest decompression, cardiac catheterization, pacemaker placement, colonoscopy, endoscopy, biopsy, ultrasound, and magnetic resonance imaging (“MRI”);
- General surgeries, such as gallbladder surgery, bowel surgery, hernia repair, and bypass surgery;
- The anatomy and function of the heart, atrial fibrillation, coronary artery disease, heart attacks, and multiple related treatments and procedures;
- Infectious diseases like influenza, virus replication, HIV, and tuberculosis and how the immune system functions;
- The anatomy of the eye, glaucoma, retinal diseases, and corneal abrasions;
- The anatomy of the skeleton, knee injuries, arthritis, osteoporosis, and multiple related treatments and procedures;
- The endocrine system and diabetes, thyroid conditions, the metabolism, and multiple related treatments and procedures;

- The structure of the skin, acne, rashes, and various forms of skin infections;
- Various forms of cancer, chemotherapy treatment, and the formation of tumors;
- Gynecology and pregnancy stages, the normal delivery of a baby, hysterectomy, and multiple related treatments and procedures;
- Fetal development, pediatric cardiac conditions, childhood asthma, and multiple treatments and procedures;
- The anatomy of the nervous system, stroke, seizure, migraine headaches, and multiple related treatments and procedures;
- The anatomy of the abdominal organ, stomach ulcers, gallbladder stones, appendicitis, and multiple related treatments and procedures;
- The anatomy and function of the lungs, asthma, pneumonia, collapse of the lung, multiple treatments, and procedures; and
- Plastic surgery, including breast implants and various versions of liposuction.

14. The animations are ideally suited for, and have been licensed by Archie MD, to various educational and commercial entities, including web portals for schools, medical organizations, medical practices, hospital-patient education, presentations, jury education, the military, and other governmental entities. When licensed to other third parties, each Archie MD animation is subject to an individual, separate license fee.

15. Archie MD is the lawful owner of the all of the copyrighted animations at issue in this action. In 2005, 2006, 2009, 2012, and 2014, Archie MD registered with the U.S. Copyright Office its images and animations, which are registered as PAu2-985-274; PAu3-118-099; PAu 3-381-192; PAu 3-648-251; VAu 1-189-224; and VAu 1-162-543.

**Archie MD and Elsevier Enter Into  
An Exclusive License for the Use of Archie MD's Animations**

16. On July 29, 2005, Archie MD and Elsevier entered into an agreement whereby Archie MD agreed to license to Elsevier a library of approximately 500 3-D animations on an exclusive basis within the academic, institutional, and professional health sciences community (the "License Agreement"). The License Agreement gave access to Elsevier to Archie MD's animation library, and allowed Elsevier the right to use Archie MD's copyrighted works for limited purposes for a limited time.

17. The initial License Agreement had a term of three years, which was renewed twice by amendment for a total of nine years. The License Agreement was also amended to allow Archie MD to license certain animations to other entities in the health sciences community.

18. In exchange for the use of the 3-D animations at issue within the scope set forth in the License Agreement, Elsevier paid Archie MD approximately \$3.6 million over nine years.

19. Pursuant to the terms of the License Agreement, Elsevier was also entrusted to maintain the confidentiality of Archie MD's animations and to abide by the parameters of the agreement so that Archie MD's years of investment and trade secrets were protected.

20. The License Agreement contained a confidentiality clause that only permitted the parties to use the confidential and proprietary information shared in connection with the agreement in order to comply with their obligation under the contract:

In connection with this Agreement, the Parties have disclosed and will disclose to each other certain confidential and proprietary information of each of them. Each Party acknowledges that the confidential information, and any work product derived from the confidential information, is proprietary to and a valuable trade secret of the owner thereof. Each Party agrees to hold in confidence any and all confidential information disclosed to it,

directly or indirectly, and agrees not to disclose such information, without the prior written consent of the other Party, other than (i) to those affiliates, parents, subsidiaries, directors, officers, employees, agents and advisors, including, without limitation, attorneys, accountants, consultants, bankers and financial advisors (collectively, “Representatives”) who need to know such information in order for a Party to perform its obligations hereunder, and (ii) as required by law or governmental or judicial proceeding or arbitration. Each Party further agrees not to utilize the confidential information of the other Party for any purpose other than in connection with the performance of its obligations hereunder, to take all reasonable precautions to safeguard such information and to return such information, including all copies and records thereof, to the other Party upon receipt of a written request therefor. Each Party’s Representatives shall be bound by the above obligations of such Party.

**Elsevier Continues to Use Archie MD’s Animations  
After Elsevier Terminated the License Agreement**

21. In June 2014, while also acknowledging the popularity of the Archie MD animations—and even praising their “quality and utility”—to Archie MD’s surprise, Elsevier gave notice to Archie MD of its intent to terminate the License Agreement. Elsevier’s termination of the License Agreement was effective as of July 1, 2015.

22. When Elsevier provided notice in June 2014 that it planned to terminate the License Agreement, a former Elsevier employee, Tom Wilhelm, told Dr. Levine that the company was no longer using Archie MD’s copyrighted animations. Later, Mr. Wilhelm reached out to Dr. Levine to tell him that the animations were “popular” and that Dr. Levine should contact his colleague, Loren Wilson, about renewing the licensing agreement. In October 2014, Ms. Wilson informed Dr. Levine that, while the animations were well received in the markets Elsevier serves, Elsevier decided to go in another, though unspecified, direction, and that Elsevier was in the process of transitioning to this new arrangement.



23. Apparently this “new arrangement” was Elsevier copying and passing off as its own slightly modified versions of Archie MD’s animations. Despite terminating the License Agreement, it is clear that Elsevier had no actual intention of halting its use of Archie MD’s animations, but continued to exploit Archie MD’s animations in various and new ways. Indeed, Elsevier did not stop using Archie MD’s expansive library of animations at all; it just stopped doing so lawfully, and stopped paying Archie MD to use them as it had done over the previous nine years.

24. Elsevier thus terminated the License Agreement, yet continues to exploit the Archie MD animations without authorization. While Elsevier has made substantial changes to its website (“Evolve”) since terminating the License Agreement through updates and modifications, more than 355 Archie MD animations remain available on Evolve to users who have paid Elsevier for access. Upon information and belief, Elsevier also removed the Archie MD logo and language stating that the animations are protected by copyright law, a requirement under the terms of the License Agreement, from the animations.

25. Not only does Elsevier continue to exploit the Archie MD animations through use on Evolve after the termination of the License Agreement, Elsevier now touts as its own at least 100 animations that constitute unauthorized derivative works made unmistakably from its exclusive access to Archie MD’s expansive library of animations.

26. There are several indicators that make it apparent that Elsevier stole from Archie MD’s animations in an attempt to make its own animations. Upon information and belief, Elsevier began creating its infringing, derivative animations in or around the fall of 2014. Around that time, Elsevier, under the username “Elsevier Multimedia,” created a channel on Vimeo, a website used to upload and share videos, that was entitled “Elsevier Animation Work

in Progress.” On this channel, Elsevier maintained both Archie MD’s original animations along with Elsevier’s infringing, derivative animations that it was in the process of creating.

27. By way of example, there was a video on the Vimeo channel that was labeled “Lumbar Puncture original Archie MD version.” The description for the video stated: “This is the Archie MD version of the Lumbar Puncture animation.” The video was played more than 30 times. Upon information and belief, after repeatedly watching Archie MD’s animation, Elsevier created at least two infringing derivative works that were labeled “Lumbar-Puncture Animatic” and “Lumbar Puncture Final Fully Rendered” on its channel. Additionally, Elsevier stored another video titled “PR004 Archie original” and used it to create at least two other infringing, derivative videos titled “PR004 Draft Animatic” and “PR004 3DF.” Elsevier has since taken down this Vimeo channel.

28. In using Archie MD’s animations as the base for its unauthorized derivative works, Elsevier has copied original elements of Archie MD’s animations, including the sequence of events, colors, the arrangement of objects, and even the voiceovers. Indeed, each Elsevier animation is of an identical topic to the Archie MD animation topics (even esoteric topics), and a side-by-side comparison of each animation demonstrates the substantial and striking similarity between the animations.

29. For example, a simple comparison of an Archie MD animation and an infringing Elsevier animation—each about cell differentiation—demonstrates that the animations are substantially similar. Both animations begin by zooming in on a bone, then making the bone transparent to show a side-by-side comparison of bone marrow on the left side and lymph tissue on the right side. Next, both animations show the components of a stem cell, with each component being put on display in the same exact order and in almost the same exact location.

Identical descriptors are included, and placement of those descriptors are the same. There is no reasonable explanation for the same exact sequence and arrangement between these two animations besides Elsevier's direct copying of Archie MD's carefully constructed animations. And a striking similarity between animations runs through each side-by-side comparison.

30. As if (i) Elsevier's exclusive access to the Archie MD animations; (ii) creating Vimeo pages to confirm it was watching Archie MD animations while creating its infringing, derivative animations; and (iii) the side-by-side comparison between the animations were not enough to demonstrate substantial copying (they are), there are even further indicators of copying. For example, certain of Elsevier's animations mimic features from an Archie MD animation that were not generic to the human body or relevant to the medical topic, but existed solely due to the circumstances of the original creation of the animation, namely, the needs of a specific lawsuit.

31. Upon information and belief, Elsevier has also continued to use—without authorization and despite Elsevier terminating the licensing agreement—Archie MD's animations in numerous other products that Elsevier currently offers.

32. On May 5, 2016, Dr. Levine gave notice to Elsevier through John Kim that it was improperly using Archie MD's animations by continuing to post the animations on Evolve and in creating unauthorized derivative works through use of Archie MD's animations. Mr. Kim acknowledged Dr. Levine's concerns and stated he would address them and reconnect within a few weeks, but he has not bothered to get back to Archie MD since that discussion to address these issues further. Moreover, Elsevier has not removed these animations from Evolve or offered to compensate Archie MD for the unlawful use.

33. As of the date this Complaint was filed, Elsevier continues to improperly use Archie MD's copyrighted animations and derivative works based therefrom. Elsevier's continued use of Archie MD's copyrighted works is causing, and if not enjoined, will continue to cause, substantial harm to Archie MD's revenue and reputation.

**CLAIMS FOR RELIEF**

**COUNT I**  
**COPYRIGHT INFRINGEMENT (17 U.S.C. §§ 106 and 501)**

34. Archie MD repeats and re-alleges the allegations of paragraphs 1 through 33 in its Complaint as though fully set forth herein.

35. Elsevier has infringed and, unless enjoined by this Court, will continue to infringe Archie MD's copyrights in its works by distributing and/or reproducing at least 355 of Archie MD's copyrighted works on Evolve following the termination of the License Agreement without Archie MD's authorization in violation of 17 U.S.C. §§ 106(1), (3), and (5) and 501.

36. Elsevier has infringed and, unless enjoined by this Court, will continue to infringe Archie MD's copyrights in its works by preparing derivative works based on Archie MD's copyrighted works in violation of 17 U.S.C. §§ 106(2) and 501. Indeed, Elsevier has created unauthorized derivative works of at least 100 of Archie MD's copyrighted animations. Elsevier is displaying at least 100 of these infringing derivative works on Elsevier's website, Evolve, without Archie MD's consent.

37. Each use by Elsevier of an Archie MD animation creates an independent act of infringement.

38. Elsevier's acts of infringement were made after the termination of Elsevier's license to use Archie MD's works, and as such, Elsevier acted with willful disregard for Archie MD's rights.

39. Moreover, the licensing agreement did not permit Elsevier to create derivative works from Archie MD's original animations, and instead explicitly limited to uses permitted by the licensing agreement.

40. Archie MD is entitled to the maximum statutory damages pursuant to 17 U.S.C. § 504(c)(2) in the amount of \$150,000 per infringing animation.

41. Pursuant to 17 U.S.C. § 505, Archie MD is entitled to recover its full costs and reasonable attorneys' fees.

**COUNT II**  
**BREACH OF CONTRACT**

42. Archie MD repeats and re-alleges the allegations of paragraphs 1 through 41 in its Complaint as though fully set forth herein.

43. On July 29, 2005, Archie MD and Elsevier entered into a contract whereby Archie MD agreed to license to Elsevier a library of approximately 500 3-D animations on an exclusive basis.

44. This License Agreement included a termination clause, which in pertinent part provides that Elsevier shall remove any and all of the copyrighted animations licensed by Archie MD from Elsevier's websites and webpages upon termination of the License Agreements if Elsevier updates or modifies its website.

45. Elsevier terminated the License Agreement on July 1, 2015.

46. Despite updating and modifying Evolve in substantial ways, Elsevier continues to display Archie MD's copyrighted animations therefrom on Evolve following the termination of the License Agreement.

47. Upon information and belief, over 355 of Archie MD's animations are still posted on Evolve and thus are being unlawfully exploited by Elsevier.

48. By using Archie MD's confidential and proprietary information in the animations to create its own unauthorized derivative works, Elsevier has also violated the confidentiality clause of the licensing agreement, and has gone far beyond the intended scope of the License Agreement.

49. Elsevier's continued use of Archie MD's copyrighted animations and derivative works based therefrom competes with Archie MD in the marketplace, harming Archie MD's revenue and reputation. As such, Archie MD is entitled to relief for Elsevier's breach of the License Agreement in an amount to be determined at trial.

**COUNT III**  
**VIOLATION OF DEFEND TRADE SECRETS ACT (18 U.S.C. § 1836)**

50. Archie MD repeats and re-alleges the allegations of paragraphs 1 through 49 in its Complaint as though fully set forth herein.

51. During the term of the License Agreement, Elsevier had access to Archie MD's confidential trade secret information.

52. Archie MD's trade secrets are used in or intended for use in interstate and foreign commerce as Archie MD sells its animations throughout the United States.

53. Under the terms of the License Agreement, Archie MD considers its animations to be confidential and proprietary and has taken reasonable steps to maintain the confidential nature of this information, including entering an agreement with Elsevier to protect those rights.

54. Elsevier willfully misappropriated Archie MD's trade secrets by retaining Archie MD's copyrighted animations after terminating the License Agreement and creating derivative works made therefrom on Elsevier's website, Evolve.

55. Elsevier is exploiting Archie MD's trade secrets by using them to create its own library of animations.

56. Elsevier's continuing use of Archie MD's animations constitutes willful and malicious misappropriation and use of confidential proprietary information and trade secrets to its own advantage in direct competition with Archie MD.

57. As a result of Elsevier's misappropriation and use of the confidential and proprietary information, Elsevier has violated the DTSA.

58. Elsevier's actions have caused and will continue to cause Archie MD irreparable harm if not preliminarily and permanently enjoined.

59. Archie MD has no adequate remedy at law.

60. As a direct and proximate cause of Elsevier's violation of the DTSA, Archie MD has sustained damages in an amount that will be established at trial as a matter of right as well as any unjust enrichment caused by this misappropriation not addressed in the calculation of Archie MD's actual loss.

61. Elsevier's willful and malicious actions allow for exemplary damages in the amount of two times Archie MD's actual loss and any unjust enrichment resulting from Elsevier's misappropriation of Archie MD's trade secrets.

62. Due to Elsevier's bad faith, as evidenced by Elsevier's continued use of Archie MD's copyrighted animations after Elsevier terminated the License Agreement, Archie MD is entitled to an award of reasonable attorneys' fees.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Archie MD respectfully requests that this Court:

A. Issue a preliminary and permanent injunction enjoining and restraining Elsevier and its officer, agents, servants, and employees and all those in active concert or participation with them, from infringing Archie MD's exclusive rights under the Copyright Act and DTSA;

B. Award Archie MD damages proven or statutory damages elected, costs, and reasonable attorneys' fees in accordance with 17 U.S.C. §§ 504 and 505 and other applicable law;

C. Award Archie MD treble damages, profits, and reasonable attorneys' fees pursuant to 18 U.S.C. § 1836;

D. Award Archie MD punitive damages in amount to be determined;

E. Award prejudgment and post-judgment interest on any monetary award in this action; and

F. Award such other and further relief as the Court shall deem just and appropriate.

**JURY TRIAL DEMANDED**

Archie MD demands a trial by jury on all issues triable to a jury.

August 22, 2016

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